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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-203

MORRIS ROSENBLATT,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner respectfully petitions that a Writ of Certiorari issue to the United States Court of Claims to review the judgment of that Court entered May 31, 1974.

OPINION BELOW

The Opinion on the case in the Court of Claims was a Memorandum Opinion which will be reported in 204 Ct. Cl. ___ and is printed in Appendix A, *infra.* This opinion affirmed and adopted the recommended decision of Trial Judge Roald A. Hogenson filed on April 6, 1973, which is printed in Appendix B, *infra.* The Opinion of the Civil Service Commission Board of Appeals and Review decided November 9, 1970, is printed in Appendix C, *infra.*

JURISDICTION

The Order of the Court of Claims was entered on May 31, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and the Rules of the Supreme Court of the United States Rule 19(1)(b) and 2.

QUESTIONS PRESENTED

1. Was Petitioner's resignation involuntary and thus a nullity?

2. Was Petitioner's resignation an adverse action, thereby entitling him to a hearing under the Veterans' Preference Act?

3. Was the Civil Service Commission misled concerning the facts in the case and were the findings of fact and recommended decision of the Court of Claims trial judge in error as not being supported by the record evidence?

STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fifth Amendment.

United States Constitution, Article II, Section 2, Clause 2.

The Veterans Preference Act, Ch. 287, Section 14, 58 Stat. 390 as amended, 5 U.S.C. 863 as restated 5 U.S.C. 7512, 7701.

The Lloyd-LaFollette Act, 5 U.S.C. 7501.

Federal Personnel Manual, Supplement 752-1, Sub-Chapter S-1-2 and 715-5 Sub-Chapter 2-1.

Section 14 of Executive Order 10988 of January 17, 1962

STATEMENT OF THE CASE

This case involves the involuntary resignation of a classified Civil Service employee entitled to a 5-point veterans preference.

On the morning of September 16, 1969, Petitioner was requested by his agency's personnel officer, Mr. Flickinger, to come to his office to discuss certain problems. Present at the meeting were Petitioner, his supervisor, Mr. Holden, and the personnel officer, Mr. Flickinger. A discussion arose as to the Petitioner's work assignments and his relationship with his fellow employees and the secretaries in his branch. At the conclusion of some exchanges between the parties concerning these problems, Petitioner asked if his resignation was being requested. The personnel officer replied, "Yes, that would be what we want." (Tr. 229).[1] Petitioner then asked what would be done if he did not resign and Mr. Flickinger replied that some form of adverse action would be taken against the Petitioner. (Tr. 42, 115, 229, 259-260). Thus, Petitioner was faced at that time with the alternative of resigning or having charges filed against him. Faced with this dilemma, the Petitioner involuntarily resigned his position the following day. The events which led up to and followed the involuntary resignation are set forth in greater detail hereafter.

Petitioner was, at the time of his involuntary resignation, a classified Civil Service employee entitled to a five point Veterans Preference. (R. 28).[2]

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[1] "Tr." refers to the pages of the transcript of proceedings taken in United States Court of Claims Docket No. 503-71 on December 15 and 16, 1971.

[2] "R" refers to the pages of the Trial Judge's report of April 6, 1973, printed in Appendix B herein.

From April 10, 1966 to October 10, 1969, Petitioner was employed as a Management Analyst, Property and Supply Management Branch, General Government Management Division, Bureau of the Budget, Washington, D.C. His grade in that position was GS-13 until October 1968, at which time he was promoted to a GS-14 (R. 28). Prior to being employed by the Bureau, Petitioner worked for the Internal Revenue Service and with credit for his military service, his service computation date for retirement purposes was December 27, 1957. (R. 28).

The Petitioner's last official performance rating covering the period from April 1, 1968 to April 1, 1969, was satisfactory. (R. 28). The Petitioner's supervisor was Mr. John B. Holden who prepared his performance evaluations. (R. 28). Mr. Holden had been the Assistant Chief of the Branch until 1967 and was, thereafter, its Chief until his retirement in late 1969.

Mr. Holden was the immediate supervisor of the Petitioner and four other officials who held grades GS-13 through GS-15 and composed the staff of the Branch. There were also two secretaries assigned thereto. (R. 29).

Sometime prior to Petitioner's departure, he conferred with Mr. Holden and inquired whether the latter might be retiring, stating that he would like to know because he had some problems working with a Mr. James Currie, the prospective successor Chief. Holden's retirement occurred about a month or two after the effective date of Plaintiff's resignation and Currie succeeded him as Chief of the Branch. (R. 29).

Early in 1969, Petitioner went to Personnel Officer, Flickinger, and expressed dissatisfaction with the treatment accorded to him in his branch and inquired concerning about a

transfer to another position in the Bureau. Mr. Flickinger advised that he would see what he could do about a transfer of position for the Petitioner. (R. 33).

In the early part of August, 1969, Petitioner went to the Bureau's Personnel Office where he met a personnel assistant on the staff of Mr. Flickinger. At that time he asked for a Form 52, which is used by an employee to either initiate a transfer or resign a position. Petitioner obtained this form so that in the event he found a new position he could use the form to set forth his reasons for the transfer. (Tr. 55-57). He was hoping to get a job with the Air Force.

During the morning of September 16, 1969, Mr. Flickinger telephoned the Petitioner and asked him to come to the Personnel Office that afternoon to discuss problems which had arisen in the Branch concerning the Petitioner and, further, that Mr. Holden would be present for the discussion. (R. 38).

The meeting was held in Mr. Flickinger's office for about an hour and a half and present were: Petitioner, his supervisor, Mr. Holden, and the Personnel Officer, Mr. Flickinger. (R. 38). The meeting opened about 1:30 p.m. with a few comments by Mr. Flickinger regarding Petitioner's attempt to secure other positions in the government and Flickinger's advice that the employment situation was "quite tight" at that particular time.

Mr. Holden was present and proceeded to enumerate his dissatisfaction over certain incidents which occurred relating to the Petitioner. He referred in particular to certain alleged delays in the submission of Petitioner's work which the Petitioner denied. Mr. Holden, in an excited tone, told the Petitioner, "I'm not going to tolerate a situation in my

office where the work doesn't get out." (Tr. 33). The Petitioner took exception to this, claiming that there was a different standard for him than for the other officials in the Branch.

At this point, the conversation became rather heated and Mr. Holden told the Petitioner that the secretaries in the Branch had reported an incident to him which had occurred on September 5, 1969. (Tr. 30-35). Mr. Holden then became quite exercised and began to shout at the Petitioner concerning the events that had taken place. At this point Petitioner became quite frightened and stunned. (Tr. 35).

The discussion then centered about the Petitioner's relationship with Mr. Currie, the Assistant Branch Chief, and whether the Petitioner would be able to work with him after Holden's retirement. During the course of this discussion, Mr. Holden then stated to the Petitioner, "If only you had done this one thing, this one thing." (Tr. 39-41). This reference related to Mr. Holden's request that the Petitioner give to Mr. Holden's secretary a list on each Monday of correspondence which he was unable to answer during the previous week, a request which Petitioner had complained was demeaning.

Mr. Flickinger then interrupted, stating that the Petitioner had apparently alienated the personnel in the Bureau of the Budget. The Petitioner has testified that Flickinger stated that in his opinion, the Petitioner was "unfit" to work for the Bureau of the Budget and said, "*We want your resignation.*" (emphasis added.) (Tr. 42). The Petitioner then inquired as to his alternatives and Flickinger advised that if the Petitioner did not resign, the Agency would take action against him. (Tr. 42, 259, 260). Mr.

Holden testified that Flickinger stated to Plaintiff as follows: "You have been confronted with these charges and it looks as though we would proceed on some basis"; to which Petitioner replied, "What do you mean, that I either resign or you will prefer charges." At which time, Mr. Holden testified that Flickinger said, "Yes, we will prefer charges." (Tr. 115, 229; R. 40).

The record establishes that Personnel Officer Flickinger was not, *at that time*, proposing any specific adverse action. (Tr. 229).

The Petitioner felt that he had no alternative but to resign, since Flickinger told him that charges would be filed against him, and that even though he could successfully rebut the charges, he would, nonetheless, have to live with the stigma of the charges themselves. (Tr. 43-44). He knew that if the charges were filed, regardless of whether he won or lost, it would be exceedingly difficult for him to locate elsewhere in the government in view of the charges having been filed and logged in his records. (Tr. 44). Petitioner did not wish to resign from the Federal Government, because he had no other position or job outside the agency. (Tr. 80).

Upon arriving home late on that same day (September 16, 1969), Petitioner discussed the day's events with his wife, who had worked as a Secretary in the Central Intelligence Agency. She advised that if charges were brought against him, even though they were not true, the charges would look bad on his record and it would be difficult for him to obtain a job in another government agency. Petitioner believed this to be true, whether he won or lost any adverse proceeding. (R. 41). Petitioner then proceeded to fill out the Form 52 which he had obtained at the Personnel Office in early August, 1969 to use for transfer,

and had his wife by use of their typewriter fill in the various blanks therein.

The next morning, Petitioner arrived at work with his partially completed resignation form, which he took to Flickinger's office and requested that the resignation be made effective at the end of his accumulated leave time. Flickinger agreed, had the matter checked and they decided on October 10, 1969, as the effective date. The Petitioner then signed the resignation form. Flickinger then stated that there would be nothing detrimental placed in Petitioner's file. Petitioner then left the building and never came back to work at the Bureau. (R. 42).

By letter dated December 4, 1969, to the then Acting Director, Bureau of the Budget, William A. Boleyn, Petitioner inquired why the Director had not discussed the entire matter with him before permitting the Personnel Officer to initiate the action taken. (R. 43). The Director responded on December 10, 1969, as follows: "I, of course discussed your problem both with Mr. Holden and Mr. Flickinger. I inquired as to whether you had indicated a desire to see me. I was informed that you had not." (R. 44).

By letter dated March 12, 1970, to Mr. Flickinger, Petitioner made a request to withdraw his resignation, stating that it was procured under duress and through coercion and tendered without benefit of any information and advice whatsoever covering rights to which he was entitled under the provisions of the Veterans' Preference Act.

The reply stated that under the regulations of the Civil Service Commission a resignation is binding on an employee once he has submitted it, and it may not be withdrawn or cancelled unless the agency believes the action was unjustified or unwarranted.

On March 28, 1970, the Petitioner addressed a letter to the Director of the Bureau of the Budget, Mr. Robert P. Mayo, wherein he requested a personal interview concerning his resignation. (R. 45, 46) Mr. Mayo responded that Petitioner's resignation was submitted voluntarily and that the Bureau was not authorized to change or rescind that action and that no useful purpose would be served by a meeting with the Petitioner. (R. 46).

By letter dated April 23, 1970, Petitioner filed an Appeal with the Appeals and Examining Office of the United States Civil Service Commission in Washington, D.C., requesting withdrawal of his resignation on the basis that it was secured under duress and through coercion. He further contended that it was tendered without the benefit of any information or advice covering his rights under the Veterans Preference Act. (R. 46). The Appeals Examining Office requested comments from the Bureau of the Budget by letter dated April 28, 1970, which was answered by Mr. Flickinger on May 11, 1970. (R. 47). The Civil Service Appeals Examining Office by decision dated July 17, 1970, denied Petitioner's request to withdraw his resignation on the grounds that it was submitted after the date the resignation became effective and that Petitioner had offered no evidence to support his allegations that the resignation was secured through duress and coercion. (R. 47). On July 25, 1970, Petitioner appealed to the Board of Appeals and Review of the United States Civil Service Commission. (R. 47). On November 9, 1970, the Board of Appeals and Review affirmed the decision of the Appeals Examining Office and on June 22, 1971, the Petitioner filed his Petition in the United States Court of Claims.

On December 15 and 16, testimony was taken in the United States Court of Claims Docket No. 503-71, before the Honorable Roald A. Hogenson, who on April 6, 1973,

filed his Opinion, Findings of Fact and Recommended Conclusion with the Court of Claims. The trial judge concluded that Petitioner's resignation was voluntary. The Court ruled, therefore, that Petitioner was not entitled to recover and that judgment should be entered dismissing Petitioner's Petition. (R. 49).

Petitioner then filed Exceptions to the Commissioner's Report on August 20, 1973. The Court of Claims, with Judge Davis presiding, affirmed and adopted the recommended decision of the trial judge on May 31, 1974.

Petitioner is hereby filing his Petition for Writ of Certiori from that decision.

REASONS FOR GRANTING THE WRIT

Forced resignations made by Civil Service employees should be subject to close scrutiny to determine whether the action was voluntary or, whether in fact, the resignation was obtained by coercion, duress, time pressure, intimidation or deception. While the Federal Personnel Manual, Supplement 752-1 in Subchapter S-1-2 outlines certain guidelines for determining whether an employee's resignation was voluntarily submitted, the guidelines stated therein need further clarification by a decision from this Court to establish once and for all when a forced resignation is an involuntary action. It is believed that the circumstances surrounding Petitioner's resignation will support a finding that his action was induced by others and not made of his own free will. A ruling by this Court to that effect would further buttress the guidelines set forth in Federal Personnel Manual, Supplement 752-1, Subchapter S-1-2. Subparagraph 3 thereof states that "if the agency uses deception, duress, time pressure or intimidation to force him to choose a particular course of action, the action is involuntary."

A. Petitioner's resignation was involuntary

The Petitioner was subjected to the impositions enumerated above in the Federal Personnel Manual, which will be discussed individually.

Deception. It is the position of Petitioner that he was deceived in three specific areas by Mr. Flickinger and Mr. Holden. At the meeting on September 16, 1969, he was told that if he did not submit his resignation, that charges would be filed against him. (Tr. 42, 115, 242, 259). This proposition was made by Mr. Flickinger even though he later testified that *he did not believe that an adverse action could be substantiated,* and that the incidents would not justify an adverse action of separation from employment. (Tr. 228-229). Thus, the Petitioner was deceived into believing that charges would be preferred against him when, in fact, the Personnel Officer did not believe that the Petitioner's past conduct would justify such a severe action as separation from the agency.

The Petitioner was also deceived at the September 16, 1969 meeting into believing that nothing detrimental would be placed in his official file concerning his alleged conduct. (Tr. 51; R. 42). The facts show, however, that not only was such material placed in his file, but that the witnesses actually used the material to refresh their recollection for purposes of testifying against Petitioner. (Tr. 120-121, 129, 130-134).

The acts of deception did not stop at the meeting of September 16, 1969. The Director of the Division, Mr. Boleyn was deceived by both Mr. Holden and Mr. Flickinger into thinking that the Petitioner did not want to discuss the problem with him. It is obvious from Mr. Boleyn's letter of December 10, 1969, addressed to the Petitioner that Boleyn had already discussed the matter with Holden

and Flickinger and was informed by them that the Petitioner did not want to see him. (R. 44).

Likewise, Petitioner was deceived when Mr. Holden and Mr. Flickinger did not advise him of his right to discuss the problem with Mr. Boleyn and, gave no indication whatsoever that Boleyn would be available to the Petitioner to discuss the situation. On the other hand, they gave every indication that Boleyn had turned the matter over to them and they were to deal with the Petitioner as they saw fit. (Tr. 45, 62; R. 44). This was not so.

Duress and Intimidation. In addition to the deception enumerated above, the Petitioner was subjected to duress and intimidation. It has been held that when a resignation is obtained under threat of charges to be brought and the person making the threat is of the opinion that the proposed adverse action cannot be substantiated or has not even been decided upon that such is a coerced resignation. *Paroczay v. Hodges,* 219 F. Supp. 89 (D.C. 1963); *Rich v. Mitchell,* 273 F.2d 78 (C.A.D.C., 1959), cert. den. 368 U.S. 854 (1961).

The test for a duress is set forth in *McGucken v. United States,* 187 Ct. Cls. 284, 289 (1969) as follows:

> ". . . three elements are common to all situations where duress has been found to exist. These are: (1) That one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. *Fruhauf Southwest Garment Company v. United States,* 126 Ct. Cls. 51, 62 and 111 F. Supp. 945, 951 (1953)."

There is no doubt that the Petitioner involuntarily accepted the terms of another since he did not wish to resign. (Tr. 56-57). His wife testified that he never intended to resign from the Federal Government and at most, he sought a transfer from one government agency to another. (Tr. 87).

Under the circumstances that prevailed, Petitioner had no other alternative but to hand in his resignation. Even though Petitioner thought he could rebut the alleged charges, he would nonetheless have to live with the stigma of the charges themselves. (Tr. 43-44). He thought that if charges were filed it would not matter whether he won or lost since it would be exceedingly difficult to locate elsewhere in the government in view of the charges having been filed in the first place. (Tr. 44). Thus, Petitioner's alternatives amounted to no alternatives at all.

That the circumstances of the resignation were the result of coercive acts hardly goes without saying. If Petitioner did not resign, then charges would be brought against him. Here the coercion arose from the fact that a threat was made which in the mind of the person making said threat could not be substantiated. See *Paroczay v. Hodges, supra.*

Thus, the test for duress as set forth in *McGucken v. United States, supra,* has been met in that the Petitioner was coerced into involuntarily accepting the terms of another in a situation which permitted no other reasonable alternative.

In addition to the threats of discharge, the Petitioner was further intimidated at the meeting of September 16, 1969, by the physical acts and demeanor of Mr. Holden, who, during the discussion, interrupted Petitioner, pounded

the table and began shouting at him. (Tr. 35). At this point the Petitioner became very frightened and stunned. (Tr. 35).

Time Pressure. After posing the alternatives of resignation or having charges filed against him, both Mr. Flickinger and Mr. Holden made it quite clear that they wanted an *immediate* decision on the part of the Petitioner. As the Petitioner testified at the hearing, the mood of Holden and Flickinger was such that "You know, like, you better do it by tomorrow morning, or else." The hostility in the room was evident and Petitioner was never told that he would have all the time he needed to consider and weigh the matter. (Tr. 44).

In the case of *Paroczay v. Hodges*, 219 F. Supp. 89 (D.C. 1963) after remand granted at 297 F.2d 439 the Court stated: (219 F. Supp. at 93):

> ". . . and as was stated in the other case, it is – the general rule that a claim of duress cannot be sustained where there is the full knowledge of the facts of the situation and ample time and opportunity for full and free investigation, deliberation, and reflection. *Wersert v. Brammon*, 358 Mo. 636, 215 SW 2d 430, 434 (1948)."

The District Court held in *Paroczay* that the resignation was involuntary because the employee was forced to make up his mind without opportunity for reflection. As in the present case, there was only one night intervening between the time of the initial discussion and the time of the resignation. Here the Petitioner felt the pressure of time which was imposed upon him at the intimidating and coercive meeting of September 16, 1969.

In the recent case of *Perlman v. The United States,* 203 Ct. Cl. __, 490 F.2d 928 (1974), the Court stated as follows:

> "In determining whether or not the Petitioner's retirement was voluntary, we must look to whether the factors operating *on his decision-making process* made a voluntary decision impossible and not what the agency officials perceived as Petitioner's condition. Cf. *Manzi v. United States,* 198 Ct. Cl. 489, 494 (1972)."

The Court found that Mr. Perlman's retirement decision was not voluntary and further stated that the presence or absence of the government's fault was not crucial in that case, but merely the fact that time pressure existed created a situation in which the free expression of choice was not possible. Time pressure alone was sufficient. In that case the Petitioner had the decision of retiring by a certain date to keep from losing a 4.5% increase in his retirement annuity or being subjected to a reduction in force.

Other cases in which a resignation has been found to be involuntary have been *Manzi v. United States,* 198 Ct. Cl. 489, (1972) wherein the employee was suffering from mental incompetence and *Cunningham v. United States,* 191 Ct. Cl. 471, 423 F.2d 1379 (1970), in which it was held that an employee is entitled to withdraw her resignation before its effective date. The record shows that in September 1969, the Petitioner was consulting a psychiatrist and a physician and that his work problems were causing him extreme anxiety and concern. (R. 38). While it is impossible to measure what effect the Petitioner's mental condition and state of anxiety had upon his involuntary resignation, it is not too difficult to assume that at the time his mind was "not his own" and that after he had

an interval of time to consider his action, he promptly labeled it involuntary.

In the case of *Goodman v. United States,* 424 F.2d 914 (C.A.D.C.), (1970) and in *Cunningham v. United States, supra,* the employees were permitted to withdraw their resignations before the effective date thereof. The fact that a request for withdrawal is not formally presented until after the effective date does not nullify the involuntary nature of the resignation. Nowhere in the case decisions can we find a mandatory requirement that the request for withdrawal must be made before the effective date in order to substantiate the resignation as involuntary. Thus, any argument that Petitioner's request for withdrawal was not timely should not be heard.

B. Petitioner was entitled to a hearing in accordance with the Veterans Preference Act.

An involuntary resignation of a Veterans Preference eligible is an adverse action within the purview of the Veterans Preference Act. 5 U.S.C. 863 (1964), now 5 U.S.C. 7511(2), and the due process clause of the Fifth Amendment of the United States Constitution. A Preference eligible is entitled to a thirty (30) day advance written notice of action to be taken against him, a personal hearing, *a hearing on the charges,* a written decision, and instructions on procedure to appeal. All of this was denied the Petitioner. These were valuable rights to which the Petitioner was fully entitled. *Autera v. United States,* 182 Ct. Cl. 495, 500 (1968). It is well established that when an employee is imporperly denied appropriate procedural guarantees, the unlawful action entitles him to money otherwise due. *Garrott v. United States,* 169 Ct. Cl. 186 (1965).

In the recent case of *Arnett v. Kennedy*, __U.S.__, 40 L.Ed. 15, 94 S. Ct. 1633 (1974), at issue was whether the employee who was removed from Government service was entitled to a hearing before or after his removal. The plurality of the Court concluded that the *post-termination* hearing procedures adequately protect federal employees.

Thus, at the very least, a federal employee removed from his employment is entitled to a post-removal hearing. Petitioner in his case *was not afforded* such a hearing in accordance with the procedures established by the Veterans Preference Act and the Lloyd-LaFollette Act, *supra*. Justice Marshall, with whom Justice Douglas and Justice Brennan concurred, submitted a dissenting opinion in *Arnett v. Kennedy*, wherein he stated his views that due process required a full evidentiary hearing conducted by an impartial decision-maker *before* the discharge of the employee. Petitioner's entitlement to a hearing at some stage (either before or after separation from the roles) is firmly established. The denial thereof constitutes error.

C. The Civil Service Commission was misled concerning the facts

The Civil Service Commission's decision was not binding because of the improper agency representations. *Pelicone v. Hodges*, 320 F.2d 754 (C.A.D.C., 1963); *Eustace v. Day*, 314 F.2d 247 (C.A.D.C., 1962). Director Boleyn was misled as to the Petitioner's desires by Mr. Holden and Mr. Flickinger when they told him that the Petitioner had no desire to discuss the matter with him. (R. 43, 44).

Mr. Flickinger misled the Commission into thinking that the purpose of the meeting was not to demand Petitioner's resignation, and that no adverse action was being proposed

when in fact, Mr. Holden testified that the Petitioner was confronted with the fact that he either resign or charges would be filed. (Tr. 115, 229; R. 40).

Mr. Flickinger further misrepresented to the Commission that Petitioner's securing of a standard form 52 indicated that he desired to resign and take outside employment. This, of course, was not the case since Petitioner was merely seeking a transfer and had even asked Mr. Flickinger to help in this regard. (Tr. 55-75, 87).

Since the Civil Service Commission determination was based upon erroneous facts, that decision was invalid. See *Liotta v. United States,* 174 Ct. Cl. 91, 96 (1966); *Blackmore v. United States,* 128 Ct. Cl. 228, 229, 120 F. Supp. 774, 776 (1954).

D. The findings of fact by the Trial Judge are not entirely supported by the record

In ultimate finding 38, the Trial Judge found that the Petitioner was contemplating leaving his employment in the branch. This was true, only insofar as a transfer was concerned, but did not extend to a resignation. (Tr. 55-57; 87).

In finding No. 2, the Trial Judge stated that Flickinger's hearing of the exchanges between Mr. Holden and Petitioner gave him sufficient reason to believe that such action would be sustainable. The transcript shows, however, that Mr. Flickinger did not testify that an adverse action would be sustainable. (Tr. 228, 229).

While finding 43 concludes that no time pressure was exerted, it fails to take into consideration the atmosphere and context of the Septemebr 16 meeting, wherein the

urgency of the decision was apparent and Petitioner's resignation was expected immediately.

For the reasons set forth above, the findings and conclusions of the Trial Judge are not supported by the record.

CONCLUSION

The outcome of this case is of importance to all federal Civil Service employees who have been or may be forced into resigning their positions. For the reasons outlined above, it is believed that this Petition for Writ of Certiorari should be granted and that this Court should delineate the guidelines and procedures which should be accorded to a Civil Service employee in forced resignation situations.

Respectfully submitted,

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Date: August, 1974.

APPENDIX A

UNITED STATES COURT OF CLAIMS

No. 503-71

* * * * *

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

ORDER

This case comes before the court on plaintiff's exceptions, filed August 20, 1973, to the recommended decision filed by Trial Judge Roald A. Hogenson on April 6, 1973, pursuant to Rule 134(h) and has been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the recommended decision of the trial judge, copies of which have been furnished to the parties, it hereby affirms and adopts the said decision as the basis for its judgment in this case.

IT IS THEREFORE ORDERED that plaintiff is not entitled to recover and plaintiff's petition is dismissed.

BY THE COURT

Oscar H. Davis
Judge, Presiding

Dated: May 31, 1974.

APPENDIX B

UNITED STATES COURT OF CLAIMS

(Filed: April 6, 1973)

* * * * *

OPINION*

HOGENSON, *Commissioner:* Plaintiff seeks judgment to recover salary lost from the effective date of his allegedly involuntary resignation from his position as a Management Analyst, Property and Supply Management Branch, General Government Management Division, Bureau of the Budget.

Plaintiff held that position from April 10, 1966, to October 10, 1969, in grade GS-13 until October 1968, and thereafter GS-14 to the end of the period.

Plaintiff submitted his resignation on September 17, 1969, which was approved and recorded by the Bureau on October 8, 1969, effective on October 10, 1969. He first requested withdrawal of his resignation about 5 months later. This was refused by the Bureau, and plaintiff's appeals to the Appeals Examining Office and the Board of Appeals and Review of the Civil Service Commission were denied.

The sole issue in this case, on which a trial was held in this court, is whether plaintiff's resignation was voluntary or involuntary.

If involuntary, the resignation was an invalid discharge, and plaintiff would be entitled to recover, because he was not afforded the procedural safeguards to which he was

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* The opinion, findings of fact, and recommended conclusion of law are submitted pursuant to Rule 134(h).

entitled as a preference eligible pursuant to 5 U.S.C. §863 (1964), such as appropriate notice of reasons for proposed adverse action, right to answer, make a personal appearance, and appeal from adverse action to the Civil Service Commission. If voluntary, the resignation was binding upon plaintiff. *McGucken v. United States,* 187 Ct. Cl. 284, 407 F.2d 1349, *cert. denied,* 396 U.S. 894 (1969).

It is concluded that plaintiff is not entitled to recover, and that his petition should be dismissed.

Plaintiff relies upon the statement in subchapter S-1-2 of Federal Personnel Manual Supplement 752-1, which defendant states it recognizes as existing precedent, that a normally voluntary action, such as a resignation, is an adverse action if it is obtained by duress, time pressure, intimidation, or deception. Plaintiff argues that the Bureau used each, and defendant asserts it used none, of these means.

Duress does not have a clear-cut definition in the law, because its application is dependent upon all of the relevant circumstances of an individual case. *Fruhauf Southwest Garment Co. v. United States,* 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953). The concept of duress thus encompasses such alleged factors as time pressure, intimidation, or deception, in determining whether plaintiff submitted his resignation involuntarily, as a result of coercion practiced by defendant. This court has held, as stated in the *Fruhauf* case, *supra,* and as restated in a civilian employee resignation case, *McGucken v. United States, supra,* 187 Ct. Cl. at 289, 407 F.2d at 1351, that three elements are common to all situations where duress has been found to exist, as follows:

> *** (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party.***

In commenting in *McGucken* on the claimant's subjective beliefs about being coerced into submitting his resignation, the court stated:

> *** By later claiming that he was mentally ill and nervous at the time of his resignation does not mean that he was forced into resigning. The involuntary nature of a resignation arises from external coercion and duress, and not from internal misconceptions or unsubstantiated threats of physical attack. Plaintiff may have believed that he was coerced, but he has adduced no persuasive evidence to show coercion.

In the application of the foregoing principles, it is necessary to consider all of the relevant facts and circumstances which lead to plaintiff's submission of his resignation on September 17, 1969.

Plaintiff worked in the pertinent Branch of the Bureau of the Budget for 3½ years, had previously held a position with the Internal Revenue Service, and with credit for military service, his service computation date for retirement purposes was December 27, 1957. His performance of duties was rated satisfactory in periodic evaluations, but in the last one prepared February 13, 1969, it was noted that plaintiff had had strained relationships with some individuals in the Bureau, and was in need of improvement in that respect, as well as in the planning and organization of his work.

Mr. John B. Holden was assistant chief of the Branch until 1967, and thereafter its chief until his retirement in late 1969 after 34 years of Government service. In 1969, he was also assistant director of the Bureau's General Government Management Division, which encompassed the Branch.

Mr. Holden was the direct supervisor of plaintiff and the other four officials, holding grades GS-13 through GS-15, composing the Branch staff. Two secretaries completed the staff.

Commencing about 6 months after his employment in the Branch, plaintiff had difficulties and was unpleasant with the secretaries who served in the Branch. Such instances arose primarily out of the circumstances that the Branch had only two secretaries, and sometimes only one, and because plaintiff reacted temperamentally to the fact that priorities had to be given to use of available secretarial services. Plaintiff felt that favoritism was shown to other staff members, which is not shown to be true. He interpreted a secretary's unavailability to perform services for him as a personal expression of disdain and disrespect for him, inspired by Mr. Holden. Plaintiff had on a number of occasions described a secretary in vulgar terms in complaints addressed to Mr. Holden, although he had not used such language directly to a secretary until the incident of September 5, 1969.

Plaintiff on several occasions had personality conflicts with persons employed in the Bureau outside of his own Branch, and Mr. Holden received complaints about plaintiff as a result. One such occasion occurred in early 1969, and Mr. Holden admonished plaintiff that he would have to learn to treat and talk to people better.

Plaintiff then went to Mr. Harry H. Flickinger, Personnel Officer, Bureau of the Budget, expressed dissatisfaction with the treatment accorded to him in his Branch, and inquired concerning obtaining a transfer to another position in the Bureau. Plaintiff complained to Mr. Flickinger that there was a cold atmosphere in the Branch, that he was kept at arm's length and excluded from activities of the small group there, and that his problem with Mr. Holden was that if any difficulty arose between plaintiff and any other person, plaintiff was always treated as the culprit, irrespective of what he said in his defense. Mr. Flickinger advised that he would see what could be done about a transfer for plaintiff. Because of his specialized qualifications, plaintiff's transfer within the Bureau was not reasonably possible, and was not accomplished, although Mr. Flickinger in good faith entertained the request. Mr. Flickinger talked to plaintiff on several occasions prior to their meeting with Mr. Holden on September 16, 1969.

Whenever he was absent on leave or official business, Mr. Holden designated a senior member of his small staff, Mr. James Currie, as the acting chief of the Branch. In early 1969, Currie was assigned by Holden to supervise plaintiff and other staff members on a project concerning revision of regulations pertaining to travel and related entitlements of Government civilian employees. Plaintiff's duties in the Branch related generally to such employee allowances, and the revision project had been basically assigned to him, but his workload had become too heavy. Plaintiff resented being supervised by Mr. Currie. There is no evidence to explain plaintiff's dislike for Mr. Currie, other than his subjective feelings of being treated generally with disdain and disrespect in the Branch. Plaintiff began to show this attitude about 6 months after the

commencement of his employment in the Branch, and unfairly blamed Mr. Holden as influencing Mr. Currie against him.

Mr. Holden's retirement occurred about a month or two after the effective date of plaintiff's resignation. Sometime prior to plaintiff's departure, he conferred with Mr. Holden and sought confirmation of indications that the latter might be retiring, stating that he would like to know, because he could not work for Mr. Currie. Mr. Currie succeeded Mr. Holden as chief of the Branch.

The Branch received a substantial amount of Congressional correspondence, and it was a firm policy of the Bureau that such inquiries be answered promptly. Those involving travel and transportation of household goods of Government civilian employees were assigned to plaintiff. He repeatedly delayed in preparing responses. Mr. Holden on a number of occasions had to speak to plaintiff about expeditious handling of such matters, and offered to reassign them to other staff members. When Mr. Holden did reassign Congressional correspondence from plaintiff to others, plaintiff expressed resentment that he was not permitted to discharge assigned responsibilities. Mr. Holden had no substantial trouble with other members of his staff on Congressional mail, and he never requested any of them to submit a list of unanswered correspondence, as he eventually asked plaintiff to do.

Delays in answering Congressional inquiries became the subject matter of discussion by the Director of the Bureau with his immediate staff, and Mr. Holden's division chief contacted him about delays ascribed to the Branch, particularly those concerning travel and transportation of household goods.

On Friday, June 6, 1969, plaintiff prepared a letter addressed to Congressman James Harvey, which was signed by the Bureau's Director of its General Government Management Division on June 10, 1969.

Plaintiff had had this assignment for about a month prior to June 6, 1969. It was a referral by the Civil Service Commission of the Congressman's request for information responsive to an inquiry of a constituent concerning travel and transportation entitlements of Government employees traveling outside the continental United States.

During the week of June 9-13, 1969, plaintiff was on leave from his employment, assisting his wife after the recent birth of their third child. Upon his return to his office the following Monday, he found on his desk a note, dated June 11, 1969, addressed to him and signed by Mr. Holden. The note mentioned delays in answering correspondence, and specifically referred to the letter to Congressman Harvey, which had been left "unanswered for more than a month." The note, couched in polite language, stated in part:

> In order that I can arrange as necessary to get correspondence in the travel area answered on a timely basis, please give Miss Alexander a list of any unanswered correspondence each Monday morning so that it can be checked against her records and forwarded to me.

Plaintiff's reaction was resentment at being faced with this note immediately upon return from leave, instead of being congratulated on the birth of his child.

On July 3, 1969, plaintiff addressed and delivered to Mr. Holden, a letter in which he stated at the outset that

he had absolutely no objection to giving Mr. Holden any list at any time covering unanswered correspondence, and then made the following assertions:

> * * * But it is humiliating and demeaning as far as I am concerned to have to give YOUR Secretary every Monday morning such a list and It is something I will not do. If you want to turn over any such list I submit to your secretary to check over her records—as you seemed to feel there was some need to do—that is up to you, of course.
>
> I think it might also be incumbent upon you to check around with everyone else to see whether anyone else is holding onto unanswered material—but that is up to you.
>
> If my life depends upon it—if my job depends upon it, I will not be treated differently than anyone else and I will be accorded by everyone the same respect and consideration they have every right to receive from me. I might also add I am totally mystified at this time just where I stand vis-a-vis my supposed staff responsibility for A-7 and A-56 given the fact the function has apparently been turned over to Jim Currie by you and I have become both his and your subordinate in everything I do and in every decision I make.
>
> I would remind you also I am 43 and ½ years of age and intend, wherever I may be employed, to be treated at all times and by everyone as though I had arrived at that majority.

During the rest of plaintiff's employment in the Branch, there was no occasion for him to submit a list of unanswered correspondence, as none accumulated.

Except for two of the men, it was the custom of the staff members to leave their Branch office area each morning for a coffee break. Those participating were Mr. Holden, Joseph D. Cohn, John Ostenso, and plaintiff. Plaintiff did not initiate such events, but one of the other three men did by stopping by the office of the others.

On one occasion in mid-1969, Mr. Holden asked Mr. Cohn to go for coffee, and the latter inquired about and was told plaintiff did not want to go. Upon the return of the group, plaintiff confronted Mr. Cohn, complained that he was being excluded from the activity, and accused Mr. Cohn of betraying him.

Mr. Cohn and plaintiff had been close friends for a number of years. It was Cohn who apprised plaintiff of the availability of the position in the Branch, which plaintiff filled in 1966. After that confrontation about the coffee break, plaintiff admittedly held bitter feelings about and never spoke to Cohn again, although the latter tried on several occasions to engage him in conversation. This alienation continued even after plaintiff left the Bureau. While still employed in the Branch, plaintiff described Cohn as a "gutless wonder," and this conduct came to the attention of Mr. Holden.

Commencing in July 1969, no one asked plaintiff to participate in a coffee break, and he did not endeavor to join the group.

In the latter part of August 1969, plaintiff went to the Bureau's personnel office where he met a personnel

assistant on the staff of Mr. Flickinger. Plaintiff asked for a Form 52, Request for Personnel Action, which is used by an employee to initiate a transfer or resignation of position. Plaintiff stated that he was going to resign, and the personnel assistant advised him of the consequences of resignation with respect to loss of coverage under the Government life insurance and health benefits programs. Plaintiff took the form with him, explaining that he was going to discuss the matter with his wife. The personnel assistant advised Mr. Flickinger of the incident. Because of his previous contacts with plaintiff, this otherwise routine event had special significance to Mr. Flickinger.

During most of 1969, the two secretaries in the Branch were Ida Alexander and Mary A. Cooke. Miss Alexander had been employed there since 1956, and was the Branch chief's secretary. She worked primarily for Holden and Currie. Mrs. Cooke was assigned to the other four officials of the staff. Her employment there had commenced in April 1969.

Until September 5, 1969, no serious problem had arisen between plaintiff and Mrs. Cooke. September 5 was a Friday. She was the sole secretary on duty, as she had been for the past 3 weeks. Miss Alexander had been on annual leave, and did not return until September 8.

In the morning of September 5, Mrs. Cooke was distributing mail in the Branch, and entered plaintiff's office. The conversation which ensued related to two postcard requests for documents, which had been referred to plaintiff. Mrs. Cooke told plaintiff she was very busy and did not have time to talk to him. Plaintiff then accused her of disliking him, and followed her from his office, shouting excitedly. She went to Mr. Holden in his office,

followed by plaintiff who demanded to know what "in hell" she was telling Holden. Plaintiff angrily complained to Holden that he had asked Mrs. Cooke to do something, that she had said she was too busy, and that she never seemed to have time to do anything. Addressing Mrs. Cooke, plaintiff pounded on Mr. Holden's desk and table, told her that everytime he tried to talk to her, she ran off in another direction, and asserted that her hostility toward him could be cut with a knife. Holden approached plaintiff and tried to pacify him, but plaintiff told him to stay away, exclaiming that he had had enough of "this crap." In the presence of Mr. Holden and two or three other members of the staff, attracted by the commotion, plaintiff stated that Holden was one of the pettiest men he had ever met, that others took their "cue" from Holden in their treatment of plaintiff, and that Holden could do what he wanted about the matter. Plaintiff then left the Branch suite and the office building, and went for a walk to compose himself.

While plaintiff was on his walk, Mrs. Cooke had work reasons to go to the Bureau Xerox room located near the Branch suite. She was seated on a chair near the door, waiting for two women employees of the Bureau to complete their use of the Xerox equipment. Plaintiff was then returning from his walk, approached Mrs. Cooke, placed his face near hers, and stated: "I hate your guts; you're a bitch."

The two women in the Xerox room made adverse comments about plaintiff's conduct, and Mrs. Cooke on the same day reported the incident to Mr. Holden. Later in the day on September 5, Mr. Holden called plaintiff and stated that if plaintiff had calmed down enough, he would like to discuss the matter with him. Plaintiff replied that he was overwrought and didn't want to discuss it then.

The next Monday morning, September 8, Mrs. Cooke was seated at her desk, and Mr. Holden and another staff member were standing somewhat removed at Miss Alexander's desk. Plaintiff entered the Branch suite, walked around Mrs. Cooke's desk, leaned over and called her a bitch. Mrs. Cooke's reaction caused an inquiry to be made, and she told Mr. Holden and the other man that plaintiff had just called her a bitch.

During the week of September 8-12, 1969, Mr. Holden again called plaintiff once or twice, but plaintiff still declined to discuss the matter.

During the same week, plaintiff on several occasions repeated his conduct of passing Mrs. Cooke's desk, leaning over and calling her a bitch. On one occasion that week, Miss Alexander overheard plaintiff's talking on his telephone, and plaintiff repeatedly referred to someone as a bitch.

Mr. Holden went to Personnel Officer Flickinger, and advised concerning the events of the past week relating to plaintiff and Mrs. Cooke. Mr. Flickinger suggested a meeting with Holden and plaintiff.

Prior to the meeting, Mr. Holden had decided that some action had to be taken about plaintiff's conduct during the preceding week, and his purpose in going to Mr. Flickinger was to see to it that plaintiff no longer worked with the secretaries, even if he had to be placed in a corner. Mr. Flickinger conferred with the secretaries, and Mrs. Cooke advised him that plaintiff had called her a "bitch" on a number of occasions while passing her desk. Neither Mr. Holden nor Mr. Flickinger had decided to bring formal charges against plaintiff. Mr. Flickinger suggested the meeting to explore solutions to the problem.

During the morning of September 16, 1969, Mr. Flickinger telephoned plaintiff and asked him to come to the personnel office that afternoon, stating the purpose to be to discuss problems which had arisen in the Branch, and advising that Mr. Holden would be present.

The meeting was held in Mr. Flickinger's office in the early afternoon of that day, and lasted for an hour or more. Present were Flickinger, Holden and plaintiff.

Before Mr. Holden's arrival, Flickinger and plaintiff had a brief conversation, in which plaintiff advised that he had been looking for another position in Government without success, and Flickinger stated that employment opportunities were scarce all over Government, and also in the Bureau, and that no way had been found to transfer plaintiff.

Upon Mr. Holden's arrival, Mr. Flickinger started the meeting by stating that there seemed to be a rather serious problem of mutual unhappiness and dissatisfaction shared by Holden and plaintiff with respect to their relationship in the Branch. He asked them to state their positions. There followed a rather extensive review in which Holden and plaintiff covered various situations and incidents, with Mr. Flickinger listening and not participating, except for an occasional question, until they had concluded their exchanges.

Mr. Holden emphasized that his immediate problem with plaintiff was his inability to get along with the secretaries and his vulgarity toward them. Holden and plaintiff gave their respective versions of the September 5 episode involving Mrs. Cooke, and the events of the following week. Plaintiff admitted calling Mrs. Cooke a "bitch" during the period of time involved, and explained why he had done

so. Holden asserted that he would not have his secretaries abused in that manner.

A discussion occurred concerning plaintiff's troubles with Mr. Currie and Mr. Cohn. Holden asked plaintiff how he expected to work for Mr. Currie, if the latter took over as chief of the Branch. Plaintiff stated that Currie had shown hostility toward him since the start of plaintiff's employment in the Branch, but insisted that he was straightening out his problems with both Currie and Cohn. Also discussed were personality clashes which plaintiff had had with three employees of the Bureau, who worked in the Office of General Counsel, Office of Legislative Reference, and Office of Management and Reorganization.

Plaintiff's delays in answering Congressional correspondence were related by Holden, and plaintiff explained that his workload was heavy. With respect to the answer to Congressman Harvey, plaintiff stated that he was interrupted on that assignment by the pressure of his work, and that he was also occupied with his family, having to take care of his other two children, because his wife was having a baby.

There was a discussion of Holden's note of June 11, 1969, asking plaintiff to submit a list of unanswered correspondence to Holden's secretary, and plaintiff's reply letter of July 3, 1969. Holden stated that he was not going to tolerate work not getting out, and plaintiff asked Holden why he had a different standard for plaintiff than other staff members, and complained that Holden was picking on him.

At the conclusion of the exchanges between Holden and plaintiff, Mr. Flickinger stated in effect that some-

thing had to be done about plaintiff's conduct in the Branch, which could not be tolerated, and Flickinger asked plaintiff what he thought should be done about it. Plaintiff asked if his resignation was being requested. Flickinger replied that resignation was a good solution, and that is what was wanted. Plaintiff then asked what would be done if he did not resign. Flickinger replied in effect that some form of adverse action would be taken. No mention was made as to the nature of the steps that would be taken. Neither Flickinger nor Holden had formulated any plan of action, although Holden was determined that something had to be done about plaintiff.

Plaintiff stated that he would discuss the matter with his wife. Neither Flickinger nor Holden made any statement as to when plaintiff was expected to submit his resignation, or otherwise advise of his decision. Plaintiff felt that he was expected to act promptly, and stated that he would let them know the next morning.

The meeting terminated in mid-afternoon of September 16, 1969, and plaintiff left the building and went directly home.

At his home in the late afternoon and evening of September 16, 1969, plaintiff considered whether he should submit his resignation, and he discussed the matter with his wife. She had in the past worked as a secretary in the Central Intelligence Agency. Although expressing that it was up to him to do what he wanted to do, she advised that if charges were brought against him, even though not true, it wouldn't look very good on his record, and it would be very difficult for plaintiff to get a job in another Government agency. Plaintiff believed this to be true, whether he won or lost in any adverse proceedings.

At his home during the evening of September 16, 1969, plaintiff used the copy of the Form 52 which he had obtained at the personnel office in late August, and had his wife by use of their typewriter fill in various blanks under printed subject matter headings, supplying plaintiff's name, birth date, social security number, title of his position, and "Resignation" as the kind of personnel action requested. As dictated by plaintiff, his wife typed the following statement under the heading "I resign for the following reasons:"

> After 3½ years in the same office, came to recognize the incompatible nature of my relationship with my superior.

Plaintiff was guarded in his statement of reasons for resignation, because he wanted to cause the least amount of difficulty in trying to find some other job.

At about 8:15 a.m. the next morning, September 17, 1969, plaintiff arrived at the Bureau with his partially completed resignation form, made a Xerox copy for himself, and then went to his office to pick up his personal effects. He left two notes to Mr. Holden on the latter's desk. Holden was not present. Office hours in the Bureau commenced at 9:00 a.m. One of the notes concerned two inquiries from agencies, being processed by plaintiff, and the other note stated:

> Despite everything that has happened, I have a good deal of respect for you, and that I think I shall, for the most part, always have kind thoughts towards you.

Plaintiff then took his personal effects and his resignation form to the personnel office where he waited for Mr. Flickinger to arrive. When Flickinger entered the suite, plaintiff advised that he had the resignation. Flickinger

took plaintiff into his private office. Plaintiff asked that the resignation be made effective at the end of his accumulated leave time, stating that it would give him the opportunity to look for another job and represent himself as being employed by the Bureau. Flickinger agreed, had the matter checked, and they agreed on October 10, 1969. Plaintiff then inserted that date on the resignation form following the heading "The effective date of my resignation will be _____," and also inserted "September 17, 1969" as the date when the resignation was written. Plaintiff signed the resignation form at the appropriate place provided. Mr. Flickinger then stated that nothing detrimental would be placed in plaintiff's file. Plaintiff then left the building, and never came back to work at the Bureau.

At the time of the meeting of September 16, 1969, and from some time prior thereto, plaintiff was seriously contemplating leaving his employment in the Branch. This was evident to Mr. Flickinger, as plaintiff had in early 1969 requested transfer to a position elsewhere in the Bureau, expressing marked dissatisfaction with his existing employment relationship, had advised of his efforts to obtain employment elsewhere, and had made a statement about resigning in obtaining the necessary form from the personnel office in late August 1969.

Plaintiff's temperamental conduct within the Bureau had resulted in employee relationships which were seriously unsatisfactory within the small staff employed there. By September 1969, plaintiff was completely alienated from most of the Branch staff.

Although Mr. Holden was determined shortly before and at the meeting that something had to be done about plaintiff, neither he nor Mr. Flickinger had planned to ask for

plaintiff's resignation, nor had either of them prepared formal charges against plaintiff. By the end of the exchanges between Mr. Holden and plaintiff, Mr. Flickinger had good reason to believe that some form of action would have to be taken against plaintiff.

Transfer of position within the Bureau was not reasonably possible, but Mr. Flickinger had in good faith entertained plaintiff's request in this respect.

When Mr. Flickinger commented near the conclusion of the meeting on the seriousness of the problem, and asked plaintiff what he thought should be done about the matter, plaintiff responded with the question as to whether his resignation was being requested, instead of being conciliatory and offering to make amends, which was contrary to plaintiff's temperamental nature. It was reasonable for Mr. Flickinger to reply that resignation was a good solution, and that that was what was wanted. When plaintiff followed with the question as to what the alternative to resignation would be, it was reasonable for Mr. Flickinger to state that some form of adverse action would be taken against plaintiff. His hearing of the exchanges between Mr. Holden and plaintiff gave him sufficient reason to believe that such action would be sustainable.

No mention was made by Mr. Flickinger or Mr. Holden as to when plaintiff was expected to reach a decision as to whether or not he would submit his resignation. No time pressure was exerted by them. Plaintiff believed that he was expected to advise them promptly, and stated that he would discuss the matter with his wife, and let them know the next morning.

After discussing the matter with his wife, who helped him fill out the resignation form in part, plaintiff freely

completed and signed the resignation in the presence of Mr. Flickinger the next morning. Plaintiff made no request for more time to consider the matter, and evidenced no uncertainty of mind about resigning.

After consideration of all of the relevant facts and circumstances, established by the credible evidence in this case, and after review of the authorities cited by the parties, it is concluded that plaitniff's resignation was not obtained by duress, time pressure, intimidation, deception, or by any other misconduct on the part of any representative of defendant, but was voluntarily executed and submitted by him, and duly accepted by the Bureau months before any request for its withdrawal.

FINDINGS OF FACT

1. Plaintiff, born December 24, 1925, is a citizen of the United States, and a resident of Silver Spring, Maryland.

2. Until his resignation effective October 10, 1969, plaintiff was a classified Civil Service employee, holding a five-point Veterans preference rating.

From April 10, 1966, to October 10, 1969, plaintiff was employed as a Management Analyst, Property and Supply Management Branch, General Govemment Management Division, Bureau of the Budget, Washington, D.C. His grade in the position was GS-13 until October 1968, and thereafter GS-14 to the end of the period of such employment. He was advanced from step 1 to step 2 in grade GS-14, effective October 6, 1969.

Prior to his employment by the Bureau, plaintiff had held a position in the Internal Revenue Service, and with credit for his military service, his service computation date for retirement purposes was December 27, 1957.

3. Plaintiff's assignment in the Property and Supply Management Branch related to regulations concerning temporary duty travel of Government civilian employees, their travel entitlements on permanent transfer of station, or employment overseas, and related matters, such as transfer of household goods.

Plaintiff's performance of duties was rated satisfactory in periodic evaluations and in particular in the last one prepared February 13, 1969, for the year ending April 1, 1969. The evaluation form for that period was prepared by plaintiff's supervisor, Mr. John B. Holden, chief of the Branch.

In his evaluation, Mr. Holden stated that plaintiff had come to the Bureau without any experience in the areas of responsibility to which he was assigned, but had made excellent progress in acquiring technical knowledge, possessed good analytical ability, and was becoming adept in researching problems, although an abnormal amount of supervision was still required.

Mr. Holden further stated that during the past year, plaintiff had had strained relationships with some individuals in the Bureau, and was in need of improvement in that respect, as well as in the planning and organization of his work.

4. Mr. Holden had been assistant chief of the Branch until 1967, and was thereafter its chief until his retirement in late 1969, after 34 years of Government service. In 1969, he also served as assistant director of the Bureau's General Government Management Division, which encompassed the Branch.

Mr. Holden was the direct supervisor of plaintiff and the four other officials, holding grades GS-13 through GS-15, composing the staff of the Branch. There were two secretaries.

Whenever he was absent on leave or official business, Mr. Holden designated a senior member of the staff, Mr. James Currie, as the acting chief of the Branch. One of the current projects of the Branch was revision of regulations pertaining to travel and related entitlements of Government civilian employees. This was basically assigned to plaintiff, but his workload became too heavy, and Mr. Holden in early 1969 assigned Mr. Currie to supervise plaintiff and other staff members who assisted on the project.

Mr. Holden's retirement occurred about a month or two after the effective date of plaintiff's resignation. Sometime prior to plaintiff's departure, he conferred with Mr. Holden and sought confirmation of indications that the latter might be retiring, stating that he would like to know, because he could not work for Mr. Currie. Mr. Currie succeeded Mr. Holden as chief of the Branch.

Plaintiff resented being supervised by Mr. Currie. There is no evidence to explain plaintiff's dislike for Mr. Currie, other than his subjective feelings of being treated generally with disdain and disrespect in the Branch. Plaintiff began to show this attitude about 6 months after he commenced his employment in the Branch, and unfairly blamed Mr. Holden for influencing Mr. Currie and the secretaries in this respect.

5. During most of 1969, the two secretaries in the Branch were Ida Alexander and Mary A. Cooke. Miss Alexander had been employed there since 1956, and was

the Branch chief's secretary. She worked primarily for Holden and Currie. Mrs. Cooke was assigned to the other four officials of the staff. Her employment there had commenced in April 1969.

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what he wanted about the matter. Plaintiff then left the Branch suite and the office building, and went for a walk to compose himself.

6. While plaintiff was on his walk, Mrs. Cooke had work reasons to go the Bureau Xerox room located near the Branch suite. She was seated on a chair near the door, waiting for two women employees of the Bureau to complete their use of the Xerox equipment. Plaintiff was then returning from his walk, approached Mrs. Cooke, placed his face near hers, and stated: "I hate your guts; you're a bitch."

The two women in the Xerox room made adverse comments about plaintiff's conduct, and Mrs. Cooke on the same day reported the incident to Mr. Holden.

7. Later in the day on September 5, Mr. Holden called plaintiff and stated that if plaintiff had calmed down enough, he would like to discuss the matter with him. Plaintiff replied that he was overwrought and didn't want to discuss it then.

8. The next Monday morning, September 8, Mrs. Cooke was seated at her desk, and Mr. Holden and another staff member were standing somewhat removed at Miss Alexander's desk. Plaintiff entered the Branch suite, walked around Mrs. Cooke's desk, leaned over and called her a bitch. Mrs. Cooke's reaction caused an inquiry to be made, and she told Mr. Holden and the other man that plaintiff had just called her a bitch.

9. During the week of September 8 - 12, 1969, Mr. Holden again called plaintiff once or twice, but plaintiff still declined to duscuss the matter.

During the same week, plaintiff on several occasions repeated his conduct of passing Mrs. Cooke's desk, leaning over and calling her a bitch. On one occasion that week, Miss Alexander overheard plaintiff's talking on his telephone, and plaintiff repeatedly referred to someone as a bitch.

Mr. Holden went to Mr. Harry H. Flickinger, Personnel Officer of the Bureau of the Budget, and advised concerning the events of the past week relating to plaintiff and Mrs. Cooke, and Mr. Flickinger suggested a meeting with Holden and plaintiff, which was held on September 16, 1969, as hereinafter related.

10. Commencing about 6 months after his employment in the Branch, plaintiff had difficulties and was unpleasant with other secretaries who had served in the Branch. Such instances arose primarily out of the circumstance that the Branch had only two secretaries, and sometimes only one, and plaintiff's temperamental reactions to the circumstance that priorities had to be given to use of available secretarial services. Plaintiff felt that favoritism was shown to other staff members, which is not shown to be true. He interpreted a secretary's indication of unavailability to perform services for him as a personal expression of disdain and disrespect for him, inspired by Mr. Holden. Prior to his use of the word "bitch" in his encounters with Mrs. Cooke in September 1969, plaintiff had on a number of occasions described a secretary in vulgar terms in complaints addressed to Mr. Holden, although he had not used such language directly to a secretary.

One difficulty with a secretary arose out of the circumstance that a predecessor to Mrs. Cooke objected to receiving instructions from plaintiff late Friday afternoon, just before quitting time, instead of waiting until Monday

morning. The instructions concerned a circular to be issued by the Bureau to Government agencies concerning regulations. Plaintiff complained to Mr. Holden. Because of the complicated nature of the subject matter involved, Mr. Holden decided that plaintiff should defer giving the instructions to the secretary until the next work-day morning.

11. Plaintiff on several occasions had personality conflicts with persons employed in the Bureau outside of his own Branch, and Mr. Holden received complaints about plaintiff as a result. One such occasion occurred in early 1969, and Mr. Holden in discussing the matter with plaintiff admonished him that he would have to learn to treat and talk to people better.

Plaintiff then went to Personnel Officer Flickinger, expressed dissatisfaction with the treatment accorded to him in his Branch, and inquired concerning obtaining a transfer to another position in the Bureau. Plaintiff complained to Mr. Flickinger that there was a cold atmosphere in the Branch, that he was kept at arm's length and excluded from activities of the small group there, and that his problem with Mr. Holden was that if any difficulty arose between plaintiff and any other person, plaintiff was always treated as the culprit, irrespective of what he said in his defense. Mr. Flickinger advised that he would see what he could do about a transfer of position for plaintiff.

Plaintiff had a specialized skill insofar as his employment in the Bureau was concerned, and his reassignment to another unit was difficult. In contrast, the Bureau had 225 budget examiners, who were interchangeable, and reassignment of one of them was feasible.

12. Mr. Holden's Branch received a substantial amount of Congressional correspondence, and it was a firm policy

of the Bureau that such inquiries be answered promptly. Those involving travel and transfer of household goods of Government civilian employees were referred to plaintiff. He repeatedly delayed in preparing responses. Mr. Holden on at least a dozen occasions spoke to plaintiff, and requested him to advise when he couldn't handle such matters expeditiously, stating that arrangements would be made to reassign them to other members of the staff. On occasions when plaintiff's workload was too heavy, Mr. Holden did reassign Congressional correspondence from plaitniff to others, and plaintiff expressed resentment that he was not permitted to discharge assigned responsibilities. Mr. Holden had no substantial trouble with other members of his staff on Congressional mail, and he never requested any of them to submit a list of unanswered correspondence, as he eventually asked plaintiff to do.

Delays in answering Congressional inquiries became the subject matter of discussion by the Director of the Bureau with his immediate staff, and Mr. Holden's division chief contacted him about delays ascribed to the Branch, particularly those concerning travel and transportation of household goods.

13. On Friday, June 6, 1969, plaintiff prepared a letter addressed to Congressman James Harvey, which was signed by the Bureau's Director of its General Government Management Division on June 10, 1969.

Plaintiff had had this assignment for about a month prior to June 6, 1969. It arose out of the circumstance that Congressman Harvey had requested the Civil Service Commission to supply information responsive to an inquiry of a constituent concerning Government policy relative to Federal employees transferred abroad. After

substantial delay by the Commission, that agency had replied to the Congressman, and advised him that his request was referred to the Bureau of the Budget to provide information which fell within its jurisdiction, *i.e.*, travel and transportation entitlements of Federal employees traveling outside the continental United States.

14. During the week of June 9-13, 1969, plaintiff was on leave from his employment, assisting his wife after the recent birth of their third child. Upon his return to his office the following Monday, he found on his desk a note, dated June 11, 1969, addressed to him and signed by Mr. Holden. Plaintiff's reaction was resentment at being faced with this note immediately upon return from leave, instead of being congratulated on the birth of his child. The note stated:

> As I have mentioned on a number of occasions we have been again embarrassed by not replying to "travel" correspondence in a timely manner—the latest one was a letter to Congressman Harvey which was left unanswered for more than a month—also several other letters were sent out last week and this week that should have been answered more expeditiously. This matter was also discussed in the last Division staff meeting.
>
> In order that I can arrange as necessary to get correspondence in the travel area answered on a timely basis, please give Miss Alexander a list of any unanswered correspondence each Monday morning so that it can be checked against her records and forwarded to me.
>
> I'm aware that we've all been overly busy in attempting to get the revision of A-56 completed, but we just have to get correspondence answered. The three items of correspondence that were left

before you went on leave took about an hour to dispose of. If you need guidance on any correspondence as to approach or position before you start writing, please see me as this may tend to speed-up the final reply.

If you care to discuss this further, I am available.

15. On July 3, 1969, plaintiff addressed and delivered to Mr. Holden, the following letter:

Just obtained this; believe you will be interested.

On the matter of last night's discussion, just want to clarify I have absolutely no objection to giving you any list you want at any time covering unanswered correspondence. But it is humiliating and demeaning as far as I am concerned to have to give YOUR Secretary every Monday morning such a list and It is something I will not do. If you want to turn over any such list I submit to your secretary to check over her records–as you seemed to feel there was some need to do–that is up to you, of course.

I think it might also be incumbent upon you to check around with everyone else to see whether anyone else is holding onto unanswered material–but that is up to you.

If my life depends upon it–if my job depends upon it, I will not be treated differently than anyone else and I will be accorded by everyone the same respect and consideration they have every right to receive from me. I might also add I am totally mystified at this time just where I stand vis-a-vis my supposed staff responsibilities for A-7 and A-56 given the fact the function has

> apparently been turned over to Jim Currie by you and I have become both his and your subordinate in everything I do and in every decision I make.
>
> I would remind you also I am 43 and ½ years of age and intend, wherever I may be employed, to be treated at all times and by everyone as though I had arrived at that majority.

During the rest of plaintiff's employment in the Branch, there was no occasion for him to submit a list of unanswered correspondence, as none accumulated.

16. Except for two of the men, it was the custom of the staff members to leave their Branch office area each morning for a coffee break. Those participating were Mr. Holden, Joseph D. Cohn, John Ostenso and plaintiff. Plaintiff did not initiate such events, but one of the other three men did by stopping by the offices of the others.

On one occasion in mid-1969, Mr. Holden asked Mr. Cohn to go for coffee, and the latter inquired about and was told the plaintiff did not want to go. Upon the return of the group, plaintiff confronted Mr. Cohn, complained that he was being excluded from the activity, and accused Mr. Cohn of betraying him.

Mr. Cohn and plaintiff had been close friends for a number of years. It was Cohn who apprised plaintiff of the availability of the position in the Branch, which plaintiff filled in 1956. After their confrontation about the coffee break, plaintiff admittedly held bitter feelings about and never spoke to Mr. Cohn again, although the latter tried on several occasions to engage him in conversation. This alienation continued even after plaintiff left the Bureau. While still employed in the Branch, plaintiff described Mr. Cohn as a "gutless wonder", and this conduct came to the attention of Mr. Holden.

Commencing in July 1969, no one asked plaintiff to participate in a coffee break, and he did not endeavor to join the group.

17. In the latter part of August 1969, plaintiff went to the Bureau's personnel office where he met a personnel assistant on the staff of Mr. Flickinger. Plaintiff asked for a Form 52, Request for Personnel Action, which is used by an employee to initiate a transfer or resignation of position. Plaintiff stated that he was going to resign, and the personnel assistant advised him of the consequences of resignation with respect to loss of coverage under the Government life insurance and health benefits program. Plaintiff took the form with him, explaining that he was going to discuss the matter with his wife. The personnel assistant advised Mr. Flickinger of the incident. Mr. Flickinger had previously talked to plaintiff on several occasions following their discussion in early 1969 concerning transfer of position within the Bureau.

18. At the time of the events in September 1969, plaintiff was consulting a psychiatrist and a physician. The latter had prescribed tranquilizers for him. No other treatment is described in the record. There is no competent evidence concerning diagnosis of plaintiff's condition. Plaintiff advised at the pretrial conference in this case that he would call Dr. Alkinvos Fourlakis as a witness, but no medical testimony was presented at the trial. Neither Mr. Holden nor Mr. Flickinger were aware of any professional treatment of plaintiff.

During 1969 plaintiff was agitated about his employment relationships, but it cannot be concluded that Mr. Holden or other employees of the Branch were responsible for plaintiff's state of mind. Plaintiff accurately described himself as being "persona non grata" during the summer of

1969, and with the events of September 1969, his alienation within the Branch was complete.

19. During the morning of September 16, 1969, Mr. Flickinger telephoned plaintiff and asked him to come to the personnel office that afternoon, stating the purpose to be to discuss problems which had arisen in the Branch, and advising that Mr. Holden would be present.

Prior to the meeting, Mr. Holden had decided that some action had to be taken about plaintiff's conduct during the preceding week, and his purpose in going to Mr. Flickinger was to see to it that plaintiff no longer worked with the secretaries, even if he had to be placed in a corner. Mr. Flickinger conferred with the secretaries, and Mrs. Cooke advised him that plaintiff had called her a "bitch" on a number of occasions while passing her desk. Neither Mr. Holden nor Mr. Flickinger had decided to bring formal charges against plaintiff. Mr. Flickinger suggested the meeting to explore solutions to the problem.

The meeting was held in Mr. Flickinger's office for about an hour or an hour and a half in the early afternoon of September 16, 1969. Present were Flickinger, Holden and plaintiff.

20. Before Mr. Holden's arrival, Flickinger and plaintiff had a brief conversation, in which plaintiff advised that he had been looking for another position in Government without success, and Flickinger stated that employment opportunities were scarce all over Government, and also in the Bureau, and that no way had been found to transfer plaintiff.

21. Upon Mr. Holden's arrival, Mr. Flickinger started the meeting by stating that there seemed to be a rather

serious problem of mutual unhappiness and dissatisfaction shared by Holden and plaintiff with respect to their relationship in the Branch. He asked them to state their positions. There followed a rather extensive review in which Holden and plaintiff covered various situations and incidents, with Mr. Flickinger listening and not participating, except for an occasional question, until they had concluded their exchanges.

Holden emphasized that his immediate problem with plaintiff was his inability to get along with the secretaries and his vulgarity toward them. Holden and plaintiff gave their respective versions of the September 5 episode involving Mrs. Cooke, and the events of the following week. Plaintiff admitted calling Mrs. Cooke a "bitch" during the period of time involved, and explained why he had done so. Holden asserted that he would not have his secretaries abused in that manner.

A discussion occurred concerning plaintiff's troubles with Mr. Currie and Mr. Cohn. Holden asked plaintiff how he expected to work for Mr. Currie, if the latter took over as chief of the Branch. Plaintiff stated that Currie had shown hostility toward him since the start of plaintiff's employment in the Branch, but insisted that he was straightening out his problems with both Currie and Cohn. Also discussed were personality clashes which plaintiff had had with three employees of the Bureau, who worked in the Office of General Counsel, Office of Legislative Reference, and Office of Management and Reorganization.

Plaintiff's delays in answering Congressional correspondence were related by Holden, and plaintiff explained that his workload was heavy. With respect to the answer to

Congressman Harvey, plaintiff stated that he was interrupted on that assignment by the pressure of his work, and that he was also occupied with his family, having to take care of his other two children, because his wife was having a baby.

There was a discussion of Holden's note of June 11, 1969, requiring plaintiff to submit a list of unanswered correspondence to Holden's secretary, and plaintiff's reply letter of July 3, 1969. Holden stated that he was not going to tolerate work not getting out, and plaintiff asked Holden why he had a different standard for plaintiff than other staff members, and complained that Holden was picking on him.

22. At the conclusion of the exchanges between Holden and plaintiff, Mr. Flickinger stated in effect that something had to be done about plaintiff's conduct in the Branch, which could not be tolerated, and Flickinger asked plaintiff what he thought should be done about it. Plaintiff asked if his resignation was being requested. Flickinger replied that resignation was a good solution, and that is what was wanted. Plaintiff then asked what would be done if he did not resign. Flickinger replied in effect that some form of adverse action would be taken. No mention was made as to the nature of the steps that would be taken. Neither Flickinger nor Holden had formulated any plan of action, although Holden was determined that something had to be done about plaintiff.

Plaintiff stated that he would discuss the matter with his wife. Neither Flickinger nor Holden made any statement as to when plaintiff was expected to submit his resignation, or otherwise advise of his decision. Plaintiff felt that he was expected to act promptly, and stated that he would let them know the next morning.

The meeting terminated in mid-afternoon of September 16, 1969, and plaintiff left the building and went directly home.

23. At his home in the late afternoon and evening of September 16, 1969, plaintiff considered whether he should submit his resignation, and he discussed the matter with his wife. She had in the past worked as a secretary in the Central Intelligence Agency. Although expressing that it was up to him to do what he wanted to do, she advised that if charges were brought against him, even though not true, it wouldn't look very good on his record, and it would be very difficult for plaintiff to get a job in another Government agency. Plaintiff believed this to be true, whether he won or lost in any adverse proceedings.

24. At his home during the evening of September 16, 1969, plaintiff used the copy of the Form 52 which he had obtained at the personnel office in late August, and had his wife by use of their typewriter fill in various blanks under printed subject matter headings, supplying plaintiff's name, birth date, social security number, title of his position, and "Resignation" as the kind of personnel action requested. As dictated by plaintiff, Mrs. Rosenblatt typed the following statement under the heading "I resign for the following reasons:"

> After 3 ½ years in the same office, came to recognize the incompatible nature of my relationship with my superior.

Plaintiff was guarded in his statement of reasons for resignation, because he wanted to cause the least amount of difficulty in trying to find some other job.

25. At about 8:15 a.m. the next morning, September 17, 1969, plaintiff arrived at the Bureau with his partially completed resignation form, made a Xerox copy for himself, and then went to his office to pick up his personal effects. He left two notes to Mr. Holden on the latter's desk. Holden was not present. Office hours in the Bureau commenced at 9:00 a.m. One of the notes concerned two inquiries from agencies, being processed by plaintiff, and the other note stated:

> Despite everything that has happened, I have a good deal of respect for you, and that I think I shall, for the most part, always have kind thoughts towards you.

Plaintiff then took his personal effects and his resignation form to the personnel office where he waited for Mr. Flickinger to arrive. When Flickinger entered the suite, plaintiff advised that he had the resignation. Flickinger took plaintiff into his private office. Plaintiff asked that the resignation be made effective at the end of his accumulated leave time, stating that it would give him the opportunity to look for another job and represent himself as being employed with the Bureau. Flickinger agreed, had the matter checked, and they agreed on October 10, 1969. Plaintiff then inserted that date on the resignation form following the heading "The effective date of my resignation will be _____," and also inserted "September 17, 1969" as the date when the resignation was written. Plaintiff then signed the resignation form at the appropriate place provided. Flickinger then stated that there would be nothing detrimental placed in plaintiff's file. Plaintiff then left the building, and never came back to work at the Bureau.

26. Certain technical data was thereafter added to the resignation form by someone other than plaintiff, such as plaintiff's position number, the names of the pertinent division and branch of the Bureau, and plaintiff's grade, step level, and salary rate.

The resignation form was thereafter corrected to show plaintiff's advancement, which became effective October 6, 1969, from step 1 to step 2 in grade GS-14, and the appropriate increase in salary from $18,531 to $19,149. After endorsements of approval by Mr. Holden, as Branch Chief, and by the Acting Director of the pertinent division, plaintiff's resignation was recorded by formal Notice of Personnel Action signed on October 8, 1969, by the Bureau's Director of Administration, which notice was issued to plaintiff.

27. By letter dated December 4, 1969, to Mr. William A. Boleyn, Acting Director of the Bureau's General Government Management Division, plaintiff stated as follows:

> I have always been at a loss to understand one thing and I ask you to take the trouble to clarify. On reflection, it has seemed strange to me that, before being asked by Personnel to meet with them concerning Mr. Holden's complaints respecting me, you did not accord me an opportunity to discuss the entire problem with you – since you were the Acting Director. I must assume that you and Mr. Holden discussed the matter before permitting it to be turned over to Personnel for their disposition. If, for example, someone had been having difficulty in Mr. Benton's group, would you not have at least discussed the problem with the party concerned?
>
> I must say that while I have no wish, desire, or reason to return to the Bureau, and have now set an entirely different course for myself, I am bitter that my career in Government (10 years) should have been destroyed in so cavalier a manner.
>
> Again, I would appreciate your reply as to why you did not consider anything I might have to say in my defense – and there was a very great deal to be said – as worth your hearing. I am sure you would hope that no one would give you such short shrift were you ever to encounter career difficulties. Very honestly, it seems to me that a kind of ice water must run in the veins of anyone who could so summarily disregard pre-

vious accomplishment and fail so completely to consider the status of the party affected; in my own case that of a married man with three very small children, ages 3 yrs., 2 yrs., and 4 mos. – not to mention a heavy home mortgage and large costs of life and health insurance for the protection of my family, etc. Fortunately, I had resources which have enabled me to hold my head above water. In this season of "good will toward men," you might ponder the good will and consideration that was shown to me and my family.

28. By letter dated December 10, 1969, Mr. Boleyn responded to plaintiff as follows:

> This is in reply to your letter of December 4 in which you asked why you had not been given an opportunity to discuss your situation with me before resigning from the Bureau of the Budget.
>
> Let me assure you that I am accessible to the staff of this Division at all times whether there are problems either of a business nature or of a personal nature. All that would have been necessary for you to have done would have been to contact me. I, of course, discussed your problem both with Mr. Holden and Mr. Flickinger. I inquired as to whether you had indicated a desire to see me. I was informed that you had not.
>
> I am sorry that the situation developed that resulted in your resignation from the Bureau. I hope that you will find a spot that will provide better satisfaction than you apparently experienced here with us.

29. By letter dated March 12, 1970, to Mr. Flickinger, plaintiff first requested withdrawal of his resignation, stating as follows:

> I am writing to request the withdrawal of my resignation on the basis that it was procured under duress and through coercion and tendered without benefit of any information or advice whatsoever covering rights to which I was entitled under the provisions of the Veterans Preferance Act – legislation which I learned of as a result of the publicity given to the recent Goodman case decision. It is my intention that the withdrawal will result in my records being corrected to show that there was no break in service and in my being credited with the salary and leave to which I would have otherwise been entitled.
>
> My position based on a review of the Goodman case is that the Bureau of the Budget should prefer written charges against me if it feels that valid ground for removal from service exists and that I should be afforded an opportunity to answer them in strict accordance with the requirements of the Veterans Preference Act. I have now consulted counsel and would be prepared to defend myself fully in any adversary proceedings.

Mr. Flickinger responded, by letter dated March 25, 1970, and stated that under regulations of the Civil Service Commission, a resignation is binding on an employee once he has submitted it; that after the resignation has become effective, it may not be withdrawn or canceled unless the agency believes the action was unjustified or unwarranted; and that the Bureau was not aware of any circumstances

which would authorize change or rescission of the action taken on plaintiff's resignation.

30. By letter dated March 28, 1970, to Mr. Robert P. Mayo, Director, Bureau of the Budget, plaintiff stated as follows:

> I am writing to request a personal interview with you. Last September I was told that unless I resigned action would be taken against me. No word or action of my accuser was called into question. Nothing I said in my own defense made any impression. I was not advised of any rights or procedural protections available to me under the Veterans Preference Act, and in fact did not know of the Act's existence until recently. It was a star-chamber proceeding from start to finish. The person who instigated the action retired from the Bureau a month or so later.
>
> When I was asked to meet with Mr. Flickinger, in his office, I had no idea that he was going to demand my resignation. I was afforded no opportunity in advance of the meeting to discuss any aspects of the matter with the Acting Director of the General Government Management Division; nor, I think unfortunately, did he ask me to meet with him for that purpose.
>
> I sincerely wish to avoid litigation and hope this matter can be handled internally. A very great wrong has been done to both me and my family. For a personal reference regarding my character, I would refer you to Sam Cohn, who has known me and my family for the past 13 years.

31. By letter dated April 8, 1970, to plaintiff, Mr. Mayo stated that the Bureau's records indicated that plaintiff's resignation was submitted voluntarily, that plaintiff did not object to the procedure or indicate any dissatisfaction with the action until more than 5 months after it became effective, that the Bureau was not authorized to change or rescind that action, and that no useful purpose would be served by a meeting with plaintiff.

32. By letter dated April 23, 1970, to the Appeals Examining Officer, United States Civil Service Commission, plaintiff requested withdrawal of his resignation on the basis that it was secured under duress and through coercion, and that it was tendered without benefit of any information or advice covering rights to which he was entitled under the provisions of the Veterans Preference Act.

33. By letter dated April 28, 1970, the Appeals Examining Office requested comments from the Bureau of the Budget on plaintiff's appeal letter, and any documents concerning the matter.

By letter dated May 7, 1970, Mr. Flickinger furnished the Bureau's response to the Appeals Examining Office.

34. By letter to plaintiff, dated July 17, 1970, the Appeals Examining Office issued its decision denying plaintiff's appeal, stating the conclusions that plaintiff's case was not parallel to that of Mr. Goodman who had attempted to withdraw his resignation prior to the time it became effective; that plaintiff had not offered any evidence to support his allegation that his resignation was secured through duress or coercion, but to the contrary, the evidence of record supported a finding that it was a voluntary act on his part; and that plaintiff's contention that he was unaware of his rights as a veteran until he read about the Goodman case in the local press was untenable.

35. On July 28, 1970, plaintiff filed an appeal with the Board of Appeals and Review, United States Civil Service Commission. On August 31, 1970, plaintiff filed a supporting statement with the Board.

36. By decision dated November 9, 1970, the Board of Appeals and Review affirmed the decision of the Appeals Examining Office.

37. Plaintiff filed his petition in this court on June 22, 1971.

ULTIMATE FINDINGS OF FACT

38. At the time of the meeting on September 16, 1969, and for some time prior thereto, plaintiff was seriously contemplating leaving his employment in the Branch. This was evident to Mr. Flickinger, as plaintiff had in early 1969 requested transfer to a position elsewhere in the Bureau, expressing marked dissatisfaction with his existing employment relationship, had advised of his efforts to obtain a position elsewhere in Government, and had made a statement about resigning in obtaining the necessary form from the personnel office in late August 1969.

39. Plaintiff's temperamental conduct within the Branch had resulted in employee relationships which were seriously unsatisfactory within the small staff employed there. By September 1969, plaintiff was completely alienated from most of the Branch staff.

40. Although Mr. Holden was determined shortly before and at the meeting that something had to be done about plaintiff, neither he nor Mr. Flickinger had planned to ask for plaintiff's resignation, nor had either of them prepared formal charges against plaintfiff. By the end of the exchanges between Mr. Holden and plaintiff at the meeting,

Mr. Flickinger had good reason to believe that some form of action would have to be taken against plaintiff.

41. Transfer of position within the Bureau was not reasonably possible, but Mr. Flickinger had in good faith entertained plaintiff's request in this respect.

42. When Mr. Flickinger commented near the conclusion of the meeting on the seriousness of the problem, and asked plaintiff what he thought should be done about the matter, plaintiff responded with the question as to whether his resignation was being requested, instead of being conciliatory and offering to make amends, which was contrary to plaintiff's temperamental nature. It was reasonable for Mr. Flickinger to reply that resignation would be a good solution, and that that was what was wanted. When plaintiff followed with the question as to what the alternative to resignation would be, it was reasonable for Mr. Flickinger to state that some form of adverse action would be taken against plaintiff. His hearing of the exchanges between Mr. Holden and plaintiff gave him sufficient reason to believe that such action would be sustainable.

43. No mention was made by Mr. Flickinger of Mr. Holden as to when plaintiff was expected to reach a decision as to whether or not he would submit his resignation. No time pressure was exerted by them. Plaintiff believed that he was expected to advise them promptly, and stated that he would discuss the matter with his wife, and let them know the next morning.

44. After discussing the matter with his wife, who helped him fill out the resignation form in part, plaintiff freely completed and signed the resignation in the presence of Mr. Flickinger the next morning. Plaintiff made no

request for more time to consider the matter, and evidenced no uncertainty of mind about resigning.

45. Plaintiff's resignation was not obtained by duress, time pressure, intimidation, deception, or by any other misconduct on the part of any representative of the Bureau, but was voluntarily executed and submitted by him, and duly accepted by the Bureau 5 months before plaintiff first requested its withdrawal.

RECOMMENDED CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law, that plaintiff is not entitled to recover, and that judgment should be entered dismissing plaintiff's petition.

APPENDIX C

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D.C. 20415

DECISION

IN THE MATTER OF	
	TYPE CASE: Alleged Involuntary Resignation
Morris Rosenblatt	

INTRODUCTION

Mr. Morris Rosenblatt appealed to the Board of Appeals and Review on July 25, 1970. This appeal is from the decision of the Commission's Appeals Examining Office (AEO) issued July 17, 1970, declining to entertain Mr. Rosenblatt's appeal from his separation by resignation, effective October 10, 1970, from the position of Management Analyst, GS-14, Step 2, $19,149 per annum, Bureau of the Budget, Washington, D.C.

STATEMENT OF THE CASE

The appellate file reveals that a meeting was held on September 16, 1969, to discuss difficulties between Mr. Rosenblatt and his Branch Chief. This meeting was attended by Mr. Rosenblatt; Mr. Harry H. Flickinger, Personnel Officer; and the Branch Chief. In his April 23, 1970 letter of appeal to the Appeals Examining Office, Mr. Rosenblatt

stated that at the conclusion of this meeting:

> I was told in an urgent and demanding tone that "we want your resignation" – to which I countered "and if I don't give it?" – following by Mr. Flickinger, "then we will take action against you."

On September 17, 1969 the appellant completed and submitted an SF-52 request for personnel action wherein he stated that he was resigning effective October 10, 1969, for the following reasons:

> "After 3½ years in the same office, came to recognize the incompatible nature of my relationship with my supervisor."

Mr. Rosenblatt was separted by resignation, effective close of business October 10, 1969. On December 4, 1969, he wrote to Mr. William A. Boleyn, Acting Director, General Government Management Division, Bureau of the Budget and stated in part:

> ". . . I have no wish, desire, or reason to return to the Bureau, and have now set an entirely different course for myself."

On March 12, 1970, five months after his separation, Mr. Rosenblatt wrote to Mr. Harry H. Flickinger requesting the withdrawal of his resignation and made reference to "the recent Goodman case decision." This request was denied on March 25, 1970.

Mr. Rosenblatt appealed to the Commission's Appeals Examining Office on April 23, 1970, requesting withdrawal of his resignation. He contended that it was secured under duress and through coercion and that it was tendered without benefit of any information or advice covering rights he alieges he was entitled to under the provisions of the Veterans Preference Act.

By its decision issued July 17, 1970, the Appeals Examining Office declined to entertain Mr. Rosenblatt's appeal based upon its finding that he had failed to offer any evidence to support the contention that his resignation was secured by duress and coercion; and that his case was not parallel to the Goodman case. Mr. Rosenblatt submitted a further appeal to the Board of Appeals and Review on July 25, 1970, and he submitted additional comments on August 27, 1970.

ANALYSIS AND FINDINGS

The Board has carefully reviewed the complete appellate record in this case including all of Mr. Rosenblatt's contentions in his letters of appeal both to the Appeals Examining Office and to the Board.

The Civil Service Commission does not have general authority for appellate review of separations resulting from resignations. It is considered that an employee has an inherent right to resign his position at any time. Separations resulting from the exercise of such rights are considered to be voluntary in character and thus not subject to appellate review by the Commission. A separation which is erroneously recorded as a resignation may be reviewed on appeal when it is shown that the resignation was given under such conditions of duress, coercion or misrepresentation as to establish that the separation was, in effect, a removal action initiated by management.

The voluntary or involuntary character of a personnel action is determined not by the form of the action, but by the circumstances which produced it. The fact that the employee may be faced with an inherently unpleasant situation, or that his choice may be limited to two unpleasant alternatives, does not, *per se*, make the resulting

action an involuntary action. Accordingly, it is *not improper* for an agency to initiate a discussion with an employee in which he is given an election between leaving his position voluntarily (by resignation) or facing charges looking toward an adverse action. In general for the action to be considered voluntary, it should be evident that the employee understood the transaction, was free to choose, and was given a reasonable time to make his choice.

It is evident from the file that Mr. Rosenblatt was mentally competent and fully understood the transaction. If we accept his version of the September 16, 1969 meeting, he was given an election between resigning or facing agency "action"(?). It is also clear that the choice was left up to Mr. Rosenblatt and he was given a reasonable time to make his choice. In fact, there is nothing in the file showing that the agency established any time limit within which to make up his mind. Mr. Rosenblatt has not contended that he was not given enough time to make up his mind. There is nothing in the file showing that Mr. Rosenblatt was required to return the next morning with his decision. He did have time to discuss this with his family and to seek guidance and counsel if he so desired.

It is clear that Mr. Rosenblatt voluntarily and of his own free will chose to resign on September 17, 1969 and that he selected October 10, 1969 as the effective date of his resignation. In a December 4, 1969 letter to the agency, the appellant stated that he had no wish, desire or reason to return to the agency and that he had set a different course for himself. It was not until March 12, 1970, five months after his separation that Mr. Rosenblatt contended that his resignation was not voluntary and that he wanted to return to the agency.

There is nothing in the Commission's regulations or in the Veterans Preference Act that requires an agency to advise an employee of his rights of appeal when he resigns. In addition, the Board is not persuaded by Mr. Rosenblatt's claim that he, a GS-14 Management Analyst in the General Government Management Division of the Bureau of the Budget in Washington, D.C., and a Federal Employee for the past ten years, a period of expanding employee enlightenment and employee rights, was unaware of his rights of appeal from agency initiated adverse actions.

Mr. Rosenblatt made a number of other contentions that are not related to the basic issue in this case, whether or not his resignation was secured under such conditions of duress or coercion as to make it an agency initiated adverse action. The Board examined these contentions, and then dropped them as not pertinent to the issues in this appeal.

In view of all of the foregoing and based upon its careful review of the complete appellate record, the Board finds that Mr. Rosenblatt has presented no information to show that his resignation was secured by duress or coercion. The Board also finds that Mr. Rosenblatt's resignation was submitted voluntarily and of his own free will, therefore, his separation by resignation on October 10, 1969 is not an action that comes within the purview of the Commission's appellate jurisdiction.

DECISION

The Board of Appeals and Review hereby affirms the decision of the Commission's Appeals Examining Office, issued July 17, 1970, declining to entertain Mr. Rosenblatt's appeal of his separation by resignation.

Section 772.307(c) of the Civil Service Regulations provides that decisions of the Board are final and there is no further right of administrative appeal.

For the Commissioners:

/s/_____

WILLIAM P. BERZAK
Chairman

November 9, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-203

MORRIS ROSENBLATT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNIED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this action in the Court of Claims to recover salary lost when he resigned his position as Management Analyst with the Bureau of the Budget. Petitioner contended that his resignation, which occurred the day following a September 16, 1969 meeting with his supervisor and a personnel officer, was involuntary and that he was therefore entitled to various procedural safeguards which were not provided him. The Board of Appeals and Review of the United States Civil Service Commission, affirming the decision of the Appeals Examining Officer, held that the petitioner's resignation was voluntary.

In an extensive and carefully considered opinion, the trial judge in the Court of Claims found that petitioner's resignation was not obtained "by duress, time pressure, intimidation, deception, or by any other misconduct on the

part of any representative of the Bureau, but was voluntarily executed and submitted by him, and duly accepted by the Bureau 5 months before plaintiff first requested its withdrawal" (Pet. App. B, p. 45).

Specifically, the trial judge found that prior to and at the time of the September 16, 1969 meeting petitioner seriously contemplated leaving his employment in the Property and Supply Management Branch of the Bureau of the Budget; that due to his temperamental conduct, petitioner was completely alienated from most of the Branch staff by September 1969; and that neither the personnel officer nor petitioner's supervisor planned to ask for petitioner's resignation at the September 16, 1969 meeting (Pet. App. B, p. 43). The trial judge further found that after the personnel officer asked petitioner for suggestions as to how to handle the serious problem, petitioner eschewed a conciliatory approach but instead inquired whether his resignation was desired. At that point, the trial judge found, it was reasonable for the personnel officer to say that this would be a good solution and that in the absence of petitioner's resignation, some form of adverse action would have to be taken (Pet. App. B, pp. 43-44). Finally, the trial judge found that neither the personnel officer nor petitioner's supervisor exerted time pressure on petitioner concerning the submission of his resignation (Pet. App. B, p. 44).

The Court of Claims adopted and affirmed the decision of the trial judge (Pet. App. A).

The sole question presented by the petition for a writ of certiorari is whether the Civil Service Commission and the Court of Claims erred in finding that petitioner's resignation was voluntary. Both the Civil Service Commis-

sion and the Court of Claims considered and rejected petitioner's contentions. Their findings, upon which we rely, are correct and further review by this Court is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.